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No. 04-436

SUPREME COURT, U.S.
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IN THE

# United States Supreme Court

GEOFFREY T. MOTT,

*Petitioner,*

*v.*

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

*Respondent.*

*On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York*

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT P. GUIDO
*Counsel of Record*
*Attorney for Respondent New York State Grievance Committee for the Tenth Judicial District*
150 Motor Parkway, Suite 102
Hauppauge, New York 11788
631-231-3775

## INTRODUCTION

This matter is a lawyer disciplinary case against Petitioner conducted pursuant to New York Judiciary Law § 90, which vests licensing and supervisory power over attorneys with the Appellate Division of the Supreme Court. The gravamen of Petitioner's argument involves an isolated evidentiary error limited in its scope and effect to a portion of the proof underlying one charge in a multi-charge case, and is absolutely without any effect upon the other charges sustained and the penalty imposed.

## STATEMENT OF THE CASE

The disciplinary proceedings below included six (6) Charges of professional misconduct, three of which were set forth in an initial Petition, plus three set forth in a Supplemental Petition. A hearing was conducted before a Special Referee appointed by the Appellate Division to hear and report with his findings on the Charges. The Appellate Division ultimately sustained and confirmed only three (3) of the Charges, all involving Petitioner's conversion of escrow funds entrusted to him in the course of two separate real estate transactions: Charge One of the Petition (related to the Javaherian transaction), and Charges One and Three of the Supplemental Petition (regarding the Sussman transaction). Petitioner admitted using the escrow funds, but in his defense claimed that he had permission to invade and borrow the funds in each case. The Special Referee rejected that defense, and the Appellate Division imposed the penalty of disbarment.

Petitioner moved in the Appellate Division for reargument and leave to appeal to the New York Court of Appeals. In opposition papers, Respondent candidly conceded that the Special Referee's findings regarding Charge One of the Petition, in part, were based upon his consideration of an affidavit not formally entered into evidence. This affidavit, annexed to the Petition as an exhibit, was never actually introduced into evidence during the course of the hearing, nor was it admitted by the pleadings. In denying reargument on this issue, the Appellate Division presumably relied upon the residuum of admissible evidence cited by the Special Referee in sustaining this particular Charge, including the finding that Petitioner lacked the consent of *both* parties to the escrow to invade and use the escrow.

As to Charges One and Three of the Supplemental Petition, these were wholly unrelated to Charge One of the Petition. The issue of the inadmissible affidavit therefore had absolutely no bearing or effect on these charges which were properly sustained by the Appellate Division. Specifically, the evidence established that a contract of sale for real property was executed in May 1998 between Arlene Sussman, seller, and Elizabeth and Juan Galarza, purchasers, a copy of which was entered into evidence. Pursuant thereto, Petitioner received the contract deposit check drawn on the account of the purchasers, as an escrowee, and deposited it into his attorney escrow account. It is undisputed that the terms of the contract required the escrowee to preserve the down payment "until closing or sooner termination of this contract". Petitioner admitted, and bank records entered into evidence con-

firmed, that he invaded the down payment funds prior to the closing of title.

In his defense, Petitioner claimed he had permission to borrow the down payment funds from the seller. The Special Referee heard testimony on this issue from both the seller and one of the purchasers, as well as the Petitioner and his paralegal. The seller testified that she never gave Petitioner permission to borrow the down payment funds. In contrast, the Petitioner and his paralegal testified he received the seller's permission to borrow the down payment funds. The Special Referee resolved the conflicting testimony in favor of the seller. Additionally, Petitioner admitted that he did not discuss the loan with, nor did he obtain the consent of the purchasers, who were also a party in interest to the escrow. Thus, the referee found that Petitioner did not have the consent of all parties to invade the escrow, and therefore failed to preserve, and wrongfully converted funds entrusted to him as a fiduciary, in violation of Disciplinary Rules 1-102(A)(8) and 9-102 of the Code of Professional Responsibility, as alleged in Charges One and Three of the Supplemental Petition.

## ARGUMENT

The Appellate Division's determination, particularly as to Charges One and Three of the Supplemental Petition, is rationally related to the evidence and, in view of the finding that he converted escrow funds, provides a rational basis for Petitioner's disbarment. The decision cannot be reasonably interpreted as standing for the proposition that the New York Courts are usurping the due process rights of lawyers in disciplinary proceedings. Petitioner simply disputes the factual findings which were resolved against him.

Petitioner's same arguments were raised in the New York State Court of Appeals which properly denied review. That Court has long refused to interfere with the Appellate Divisions in the exercise of the disciplinary powers vested therein by virtue of Judiciary Law § 90. In *Matter of Flannery*, 212 N.Y. 610 at 611, the Court held as follows:

> Our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. (Matter of Goodman, 199 NY 143; Matter of Robinson, 209 NY 354) It is not for us, where the evidence is conflicting, to determine where lies the truth. It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In establishing the standard of conduct to which the bar must at its peril conform, the appellate division has wide discretion, with which we have neither the wish nor the power to interfere.

Similarly, in *Matter of Del Bello*, 19 N.Y. 2d 466 (1967), the Court stated:

> This court possesses no power to rule upon the facts, in the absence of an abuse of discretion as a matter of law, or to determine the severity of punishment in these disciplinary proceedings.

(19 N.Y. 2d at 472).

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Hauppauge, New York
October 19, 2004

Respectfully Submitted,

ROBERT P. GUIDO
*Counsel of Record*

*Attorney for Respondent*
*New York State Grievance Committee*
*For the Tenth Judicial District*
150 Motor Parkway, Suite 102
Hauppauge, New York 11788
631-231-3775